Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of New DBSD Satellite Services	)	IB Docket No. 11-149
G.P., Debtor-in-Possession, and TerreStar	)	(DA 11-1555)
Licensee Inc., Debtor-in-Possession	)	
	)	File No. SES-MOD-20110222-00985
For Rule Waivers and Modified Ancillary	)	File No. SES-MOD-20110822-00983
Terrestrial Component Authority	)	
	)	Call signs: E070272, E060430

OPPOSITION OF VERIZON WIRELESS

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Verizon Wireless opposes the "Petition of Sprint Nextel Corporation to Condition Approval" filed on October 17, 2011, in this proceeding.

SUMMARY

Sprint requests that the Commission impose operating conditions on DISH Network Corporation as the transferee of the DBSD and Terrestar MSS licenses -- conditions that would subject non-parties to this proceeding to discriminatory regulation. Specifically, Sprint proposes to include the restrictions on making spectrum capacity available to Verizon Wireless and AT&T that were imposed on SkyTerra Communications, Inc. (now LightSquared) in March 2010 – restrictions that remain under challenge.

While we take no position on the underlying applications or any other conditions Sprint or other commenters propose, Sprint's request to impose discriminatory spectrum use conditions that apply only to selected third parties must be rejected. First, the proposed conditions implicate issues that – if they are to be addressed at all – must be considered in a notice and comment rulemaking proceeding, where the entities to be affected have a full and fair opportunity to address them. Such conditions cannot be imposed in isolated transactions to which the affected

entities are not parties. Second, Sprint's primary rationale is that these restrictions were imposed on SkyTerra, but that is of course no basis for conditioning this transaction. Commission staff's decision to adopt those conditions in the SkyTerra proceeding was unlawful on multiple grounds. Extending them to DISH would compound the illegality of the SkyTerra order. Third, these conditions would directly conflict with the Commission's policy to facilitate wireless carriers' access to additional spectrum to meet growing customer demands, as well as with its policy to promote unfettered secondary spectrum markets as a source of needed spectrum. Sprint offers no facts that demonstrate why such conditions are necessary or even appropriate. They would in fact be arbitrary, discriminatory and unworkable. Fourth, Sprint ignores the Commission's April 2011 order establishing general rules that enable it to review MSS spectrum leases for competitive issues. Given those new rules, there is no justification for the transaction-specific, advance leasing prohibitions that Sprint wants. Fifth, to the extent Sprint's theory is that spectrum should be reserved for smaller wireless providers, it would be arbitrary and illegal to restrict Verizon Wireless and AT&T – but not Sprint, which has asserted it has the largest spectrum position in the wireless industry. Accordingly, the Commission should reject Sprint Nextel's proposed conditions.

I. THE CONDITIONS COULD NOT BE IMPOSED EXCEPT THROUGH A RULEMAKING.

The conditions Sprint proposes would require DISH to seek Commission approval before making its spectrum available to Verizon Wireless and/or AT&T, but would limit access to no other companies. Specifically, Sprint Nextel states that the Commission should require DISH to obtain Commission approval before: "(1) [DISH] makes its spectrum available to either of the two largest terrestrial providers of CMRS and broadband services, or (2) it provides traffic capacity to the two largest terrestrial providers of CMRS and broadband services that accounts

for more than twenty-five percent (25%) of DISH's total traffic on its terrestrial network in any Economic Area whether on a wholesale basis, roaming basis, network sharing agreement or any other arrangement."[1]

Conditions such as those proposed by Sprint that impact parties other than the applicants can be lawfully considered only in a rulemaking proceeding, not in this individual application proceeding. In fact, the two cases that Sprint relies on in support of its position – that limitations such as those proposed ensure enhanced competition in the wireless sector – are both orders adopted in Commission rulemaking proceedings, not conditions of individual transactions.[2] Moreover, these cases did not adopt restrictions on spectrum use or target individual providers, and are thus irrelevant to this proceeding. By proposing licensing and traffic restrictions with regard to Verizon Wireless and AT&T, Sprint asks the Commission to act on broad issues regarding competition in the CMRS marketplace that are beyond the scope of this transaction. `

Further, neither Verizon Wireless nor AT&T – nor other companies potentially governed by this condition in the future – are applicants in this proceeding. As such, a rulemaking is the only appropriate venue for consideration of these issues of broad applicability, and neither Verizon Wireless nor AT&T can be subjected to regulation through an order acting on the applications. Indeed, adoption of transaction conditions that adversely affect the interests of

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1 Petition of Sprint Next Corporation to Condition Approval, IB Docket No. 11-149, at 10-11 (Oct. 17, 2011) ("Sprint Petition").

2 *See id.* at 11 (citing *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532 (1994); *Rulemaking To Amend Parts 1, 2, 21, And 25 Of The Commission's Rules To Redesignate The 27.5-29.5 GHz Frequency Band, To Reallocate The 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997)).

third parties who are not the applicants would also conflict with Commission precedent.[3] While Sprint may assert that the conditions would be permissible because they would be expressly imposed on DISH, that would be sophistry – the obvious intent and effect of the conditions would be to subject two non-parties as well as DISH to restrictions.

Other participants have called on the Commission to initiate a rulemaking on various other issues raised by the applications in this proceeding.[4] As the Commission has previously found, "a rulemaking proceeding is generally[] a better, fairer and more effective method of implementing a new industry-wide policy than is the ad hoc and potentially uneven application of conditions in isolated[] proceedings affecting or favoring a single party."[5] To the extent the Commission was to consider the spectrum use conditions proposed by Sprint, it could only do so through a rulemaking, and could not impose them as a condition on grant of the applications now before it.

II. EXTENDING THE SKYTERRA CONDITIONS TO DISH WOULD COMPOUND THE ILLEGALITY OF THOSE CONDITIONS.

Sprint's primary justification for the proposed conditions is that the International Bureau and the Wireless Telecommunications Bureau adopted similar conditions in the SkyTerra

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[3] *See AT&T Inc. and BellSouth Corporation Application of Transfer of Control,* Order on Reconsideration*,* 22 FCC Rcd 6285 (2007) (modifying merger condition to remove provisions that regulated the conduct of parties other than the applicants).

[4] *See* Comments of CTIA – The Wireless Association®, IB Docket No. 11-149 (Oct. 17, 2011); Letter from Kathleen O'Brien Ham, Vice President, Federal Regulatory Affairs, T-Mobile USA, Inc. to Marlene Dortch, Secretary, Federal Communications Commission, IB Docket No. 11-149 (Oct. 17, 2011).

[5] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, ¶ 218 (2002).

proceeding, as if two wrongs would make a right.[6] But those conditions were unlawfully imposed in that proceeding, and are the subject of numerous legal challenges that have yet to be addressed – more than 18 months later – by the full Commission.[7]

As Verizon Wireless (and AT&T in its own petition for reconsideration) demonstrated, the traffic and leasing restrictions were both procedurally and substantively illegal. The SkyTerra order violated the Administrative Procedure Act because it regulated companies that were not parties to the proceeding, the conditions were never sought by any party, there was nothing in the record even remotely related to them, the order itself offered no record evidence or rationale, and the conditions were standardless (by leaving compliance to the "sole discretion" of the Bureaus) and thus arbitrary and capricious. The order also violated Verizon Wireless' due process rights by denying it any notice of the conditions or affording the company an opportunity to be heard. And, the conditions themselves were invalid because they did not address any transaction-specific harms or issue, in violation of settled Commission transaction review policy.

All of these challenges to the spectrum use conditions imposed by the SkyTerra order remain unaddressed. Extrapolating the conditions into another satellite license transaction, far from supplying a justification for regulating DISH, would only exacerbate the illegality of the SkyTerra order.

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[6] Sprint Petition at 10 ("If the Commission approves the Transfer, grant of the Applications would give DISH a level of flexibility for MSS/ATC similar to, if not greater than, LightSquared's waiver in the Commission's prior proceeding. Therefore, the Commission should impose similar conditions to any grant of the Applications to further the public interest by promoting competition in the mobile wireless and broadband markets.").

[7] Petition for Partial Reconsideration of Verizon Wireless, IB Docket No. 08-184, at 16 (April 1, 2010) ("Verizon Wireless SkyTerra Reconsideration Petition"); Reply to Oppositions to Petition for Partial Reconsideration of Verizon Wireless, IB Docket No. 08-184 (April 19, 2010) ("Verizon Wireless SkyTerra Reconsideration Reply"). *See also* AT&T SkyTerra Reconsideration Petition; Reply of AT&T Inc. in Support of Petition for Reconsideration, IB Docket No. 08-184 (April 19, 2010) ("AT&T SkyTerra Reconsideration Petition").

III. SPRINT'S PROPOSED CONDITIONS LACK FACTUAL SUPPORT, WOULD UNDERMINE COMMISSION POLICY, AND WOULD BE DISCRIMINATORY AND UNWORKABLE.

The conditions are also invalid because they would irrationally discriminate among wireless competitors by restricting the ability of Verizon Wireless (and AT&T) – but no other competitor -- to freely enter into agreements to lease or otherwise use spectrum. Indeed, Sprint asserts that restricting Verizon Wireless' and AT&T's access to spectrum in this manner is necessary to promote competition, ignoring the fact that Sprint already has access to the largest amount of spectrum of any mobile wireless service provider. Sprint's petition is an obvious attempt to thwart access by competitors to spectrum that the Commission has acknowledged is in short supply and great demand, and to cement Sprint's preferred place as the largest holder of spectrum in the country.

Sprint has provided no technical or economic basis for why Verizon Wireless and AT&T – but no one else – should be restricted in their ability to enter business relationships with DISH,[8] what specific competitive harm would result from DISH having the freedom to lease its spectrum to any wireless provider, or how the affected parties could ensure their compliance with the 25 percent traffic condition. Put simply, Sprint fails to provide any facts at all, let alone any facts that demonstrate how the conditions would relate to the instant transaction. Its Petition thus must be rejected under the Commission's well-settled policy that it will impose only "transaction specific conditions" that remedy demonstrated harms that would flow from the transaction.[9]

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[8] *See, e.g., Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (finding that the FCC must provide a "reasoned basis" before restricting access to spectrum, because doing so can have a "profound effect on the ability of businesses to compete").

[9] *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17462 (2008); *see* Verizon Wireless SkyTerra Reconsideration Petition at 14-15.

Sprint's proposed conditions would also fly in the face of the Commission's recognition that wireless carriers need more spectrum – and that robust secondary markets are a valuable way for them to meet those needs. As the Commission has repeatedly acknowledged, more spectrum is needed "to meet growing demand for wireless broadband services, and to ensure that America keeps pace with the global wireless revolution."[10] Further, the Commission has stated that "[d]emand is difficult to predict due to uncertainties about future devices and user behavior."[11] There has been a recent explosion in demand for mobile data – global mobile data traffic grew 2.6-fold in 2010, nearly tripling for the third year in a row.[12] An FCC technical analysis concluded that a spectrum deficit approaching 300 MHz is likely by 2014, and that the benefit of releasing additional spectrum is likely to exceed $100 billion.[13] The National Broadband Plan warned that "[i]f the U.S. does not address this situation promptly, scarcity of mobile broadband could mean higher prices, poor service quality, an inability for the U.S. to compete internationally, depressed demand and, ultimately, a drag on innovation."[14] Moreover,

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10 Federal Communications Commission, *Connecting America: The National Broadband Plan* at 84 (2010) ("*National Broadband Plan*").

11 *Id.* at 84. *See also id.* ("In addition, bandwidth supply and demand are co-dependent. More bandwidth begets more data-intensive applications which begets a need for more bandwidth. Indeed, it is this virtuous cycle that has made broadband an innovation growth engine over the past decade—but also makes forecasting difficult.").

12 *See* Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2010-2015 at 1 (Feb. 1, 2011), *available at* http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf.

13 FCC Staff Technical Paper, *Mobile Broadband: The Benefits of Additional Spectrum* at 26 (October 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302324A1.pdf.

14 *National Broadband Plan* at 77.

the Commission has credited secondary markets as a valuable means for spectrum to flow to its most productive use and to address the specific spectrum needs of network providers.[15]

Given carriers' growing need for additional spectrum and the inherent delays in bringing new spectrum to market, there is no basis for the Commission to restrict companies' access to available spectrum that may be necessary to support their continued innovative operations – particularly when such a restriction is applied only to selected operators. The unique Verizon Wireless and AT&T-specific approval requirement proposed by Sprint would interfere with freely operating secondary markets and could preclude business arrangements that would allow these carriers to address the growing capacity demands of consumers. As Verizon Wireless has previously observed, such restrictions of business dealings could also limit DISH's ability to deploy its network consistent with whatever obligations the Commission ultimately imposes.[16]

Further, the traffic limit is unreasonable and unworkable. DISH would be prohibited from providing traffic capacity to Verizon Wireless and/or AT&T in excess of 25 percent of DISH's total traffic on its network in any Economic Area.[17] This condition would apply to all traffic, whether on a wholesale basis, roaming basis, network sharing agreement, or any other arrangement. This would place Verizon Wireless and AT&T in the position of guessing the total traffic volumes on DISH's network in each Economic Area, as well as the proportion of that

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[15] *Id.* at 83 ("Secondary markets provide a way for some network providers to obtain access to needed spectrum for broadband deployment.").

[16] Verizon Wireless SkyTerra Reconsideration Petition at 16 ("Yet, to the extent the conditions restrict potential SkyTerra terrestrial partners and options for revenues, they could limit SkyTerra's ability to complete that 4G network."); AT&T SkyTerra Reconsideration Petition at 5 ("Artificially limiting SkyTerra's commercial flexibility and potential customer base can only reduce the likelihood that SkyTerra will be able profitably to deploy and operate terrestrial facilities that have not progressed beyond the drawing board in the six years since SkyTerra's predecessor obtained MSS Ancillary Terrestrial Authority ('ATC').")

[17] Sprint Petition at 10.

traffic handled by the other and its affiliates. Not only would this condition create considerable business uncertainty, it would place the companies involved at serious risk of unknowingly or unintentionally causing DISH to violate the condition, without being able to control against that risk. Additionally, each party's already limited ability to enter into business arrangements with DISH would be further restricted by the arrangements of the other.[18]

IV. THE NEW GENERIC MSS LEASING RULES OBVIATE ANY BASIS FOR IMPOSING SPECIFIC CONDITIONS ON DISH.

Sprint also completely ignores the Commission's rulemaking order in April 2011, which adopted new, general spectrum leasing rules for MSS licensees.[19] The Commission there concluded that, "to create greater predictability and regulatory parity with bands licensed for terrestrial mobile broadband service, we extend the Commission's existing secondary market 'spectrum manager' leasing policies, procedures, and rules that currently apply to wireless terrestrial services to the use of MSS/ATC spectrum for the provision of terrestrial services."[20] It found that because MSS/ATC operations could impact wireless competition, it should establish a process – applicable to all MSS lessors and lessees – extending the existing terrestrial spectrum manager leasing process to MSS spectrum. Under this process, parties to leases of MSS spectrum are required to file a notification that they have entered into the lease, enabling the Commission to seek additional information – as it already routinely does for terrestrial spectrum leases – and to flag any potential competitive issues. In this way, the Commission is fully able to take appropriate action to protect competition or other policies for the use of MSS spectrum.

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[18] Verizon Wireless SkyTerra Reconsideration Petition at 19 ("For example, Verizon Wireless may provide only 1 percent of SkyTerra's traffic in an EA, yet be forbidden from providing additional traffic if AT&T's usage equaled 24 percent.").

[19] *Fixed and Mobile Services in the Mobile Satellite Service Bands,* Report and Order, 26 FCC Rcd 5710 (2011).

[20] *Id.* At 5710-11.

These new generic rules moot any possible basis for the Commission to consider the conditions Sprint seeks. If and when DISH (or for that matter any other MSS licensee) enters into a spectrum manager lease, the parties will file the requisite notification, triggering whatever review the Commission determines is appropriate. Conversely, there is no basis to impose a priori restrictions on the actions of one MSS licensee, as Sprint requests. The Commission's rulemaking action, in short, is the proper way for the Commission to drive policy on access to MSS spectrum – and Sprint's proposal for conditions on DISH is the wrong way.

V. ANY SPECTRUM USE CONDITIONS MUST APPLY TO SPRINT GIVEN ITS OWN CLAIMED SPECTRUM "ADVANTAGE."

Sprint alleges that the leasing and traffic restrictions would ensure that the spectrum "would be primarily leased to smaller CMRS and broadband competitors."[21] This is incorrect. Constraining access of Verizon Wireless and AT&T to DISH's spectrum would not preclude DISH from entering into a lease or other use agreement giving one other provider access to all of its capacity – such as Sprint – a result that would not ensure the benefits to smaller carriers Sprint claims. It should be obvious that Sprint is motivated, as it was in defending the LightSquared order, by its goal of foreclosing competitors from access to spectrum, thus giving it more favorable access – and at a lower price.

Sprint's argument that DISH should be foreclosed from leasing spectrum to two competitors – but not to Sprint itself – is particularly egregious given that it is Sprint – not AT&T or Verizon Wireless – that currently has access to the largest amount of spectrum of any mobile broadband service provider and claims that leading spectrum position gives it a unique advantage. According to Sprint CEO Dan Hesse, Sprint's partnership with Clearwire "gives us

[21] Sprint Petition at 10.

the largest spectrum position of any company in America."[22] Through this arrangement Sprint is estimated to have access to approximately 150 megahertz of spectrum in the nation's top 100 markets,[23] in addition to Sprint's own spectrum holdings. Mr. Hesse has also stated that "[w]e have the spectrum resources where we could add LTE if we choose to do that, on top of the WiMAX network. The beauty of having a lot of spectrum is we have a lot of flexibility."[24] Sprint Vice President Todd Rowley proclaimed that Sprint has "more spectrum than any other national carrier for rolling out 4G."[25] And another Sprint presentation declared, "[h]aving more spectrum available is a far greater advantage than the frequency band it occupies."[26] Moreover, Sprint recently secured access to substantially more nationwide spectrum -- half of the spectrum capacity of LightSquared's system.[27]

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[22] Richard Martin, *Sprint Wins in WiMax Deal, But Risks Still Loom*, InformationWeek (May 7, 2008), *available at* http://www.informationweek.com/news/mobility/wifiwimax/207600572.

[23] Dan Meyer, *Clearwire posts strong customer growth, clears path for technology options*, RCRWireless (May 6, 2010), *available at* http://www.rcrwireless.com/article/20100506/quarterly_earnings/clearwire-posts-strong-customer-growth-clears-path-for-technology-options/.

[24] Eric Zeman, *Will Sprint Dump WiMAX for LTE?*, InformationWeek (Mar. 7, 2011), *available at* http://www.informationweek.com/news/mobility/wifiwimax/229300496.

[25] News Release, Sprint Nextel, "Open Letter from Todd Rowley, Vice President 4G – Sprint Continues to Lead in 4G" (Jan. 3, 2011), *available at* http://newsroom.sprint.com/article_display.cfm?article_id=1754.

[26] "Mobile WiMAX: The 4G Revolution Has Begun," Version 1.0 at 12, *available at* http://www4.sprint.com/servlet/whitepapersdbdownload. *See* Letter from Bryan Tramont, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 08-184, at 4 (July 6, 2010).

[27] News Release, Sprint Nextel, "Sprint Nextel and LightSquared Announce Spectrum Hosting and Network Services Agreement" (July 28, 2011), available at http://newsroom.sprint.com/article_display.cfm?article_id=1989: "The agreement also provides Sprint the opportunity to purchase up to 50 percent of LightSquared's expected L-Band 4G capacity."

As Verizon Wireless observed in opposing the SkyTerra order, even if discriminatory spectrum use conditions regulating only two competitors were justifiable – and they are not – the conditions advocated by Sprint should, if anything, apply to Sprint itself.[28] If limiting access to spectrum is an appropriate tool to promote diversity of spectrum ownership, then by definition Sprint's spectrum "advantage" should trigger limits on its own spectrum holdings. Put another way, if Sprint's argument that conditions on spectrum access are valid, then the most obvious target for limiting access to spectrum would be Sprint itself.

VI. CONCLUSION

For the reasons set forth above, the Commission should reject the conditions proposed by Sprint with regard to leasing and data traffic.

Respectfully submitted,

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[28] Verizon Wireless SkyTerra Reconsideration Reply at 7-8.

CERTIFICATE OF SERVICE

I, Linda L. Clowe, hereby certify that on this 27th day of October 2011, I have caused a true and correct copy of the foregoing Opposition of Verizon Wireless to be served upon the parties listed below at the following physical or electronic mail addresses:

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